

RECEIVED

APR 03 1986

Baker, Maxham & Jester

MAILED

Art Unit 323

Paper No. 11.

MAR 31 1986

Appeal No. 570-33

PAT. & T. M. OFFICE
BOARD OF APPEALS

DFB

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte Marian E. Gillett

- - -

Application for Patent filed July 27, 1981, Serial
No. 287,141, which is a Continuation of Serial No. 117,848, filed
February 4, 1980. Disposable Flexible Cutting Board.

Freling E. Baker et al. for appellant.

Primary Examiner - Robert C. Watson.

Before Parker, Stahl and Keenan, Examiners-in-Chief.

Parker, Examiner-in-Chief.

Three issues are presented here for our consideration.
They are:

(1) Whether the examiner erred in rejecting claims 4
through 6 and 11 under 35 USC 112, first paragraph, for lack of
support in the original specification for the expression
"non elastic" appearing in claim 11 and identified as new matter
by the examiner,

(2) Whether the examiner erred in rejecting claims 11 and 4 through 6 as being unpatentable (35 USC 103) over Whiteford¹, and

(3) Whether the examiner erred in rejecting claims 4 through 6 under the provisions of 35 USC 103 as being unpatentable over Whiteford in view of Hearn².

We hold that the examiner did not err in either case and affirm.

The claimed invention relates to a "Disposable Flexible Cutting Board." As depicted in the application drawings, the board consists of a thin, flat sheet [12] of durable plastic material of any suitable configuration or size and about nine mils in thickness. The sheet of material is used to protect a countertop against cutting from a knife when sharpening material or the like and to permit flexing for quick and easy funnelling of the chopped material into a bowl or container.

The appealed claims read as follows:

11. A thin flexible cutting sheet for protecting a support surface from knife cuts, said sheets comprising:

a sheet of thin flexible non elastic non-toxic durable polypropylene material having a thickness of about 9 mil and at least one planar face for supporting comestible on a support surface to be chopped with a knife and having a flexibility sufficient to permit rolling said sheet into a substantially funnel shape, said sheet having a durability sufficient to resist the cutting action of a cutting knife for protecting an underlying support surface from knife cuts during the cutting of comestibles.

4. The cutting board of claim 11 having a liquid retaining rim around the edge thereof.

5. The cutting board of claim 11 having a flat rectangular configuration.

6. The cutting board of claim 11 having a flat circular configuration.

| | | |
|--------------|-----------|---------------|
| 1. Whiteford | 3,305,124 | Feb. 21, 1967 |
| 2. Hearn | 3,811,989 | May 21, 1974 |

Appeal No. 570-33

The references are adequately described on pages 7 through 9 of the brief.

Turning first to the rejection of claims 4 through 6 and 11 under the provisions of 35 USC 112, first paragraph, we find that it is based upon the examiner's objection to the specification as not providing support for the invention as now claimed. For example, the examiner stated, the original disclosure does not recite "non elastic." This paragraph of the statute (35 USC 112, first paragraph), the examiner continues, requires that:

"the specification shall contain a written description of the invention and of the manner and process of making and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention."

Thereafter, the examiner opined that the recitation "non elastic" constitutes new matter which is wholly unsupported subject matter.

In controverting this rejection, appellant argues principally that:

"[t]his is an inherent characteristic of the specified material and Applicant has intended to include such in the specification."

The examiner countered this argument by pointing out that appellant is in error in this regard. To support this position, the examiner then went on to state that:

"[i]t is well known to those skilled in the art that the final characteristics of a plastic material are influenced by such factors as the curing temperature, curing time, curing agents, filler materials, whether or not the material is reinforced with a fiber, the type of fiber reinforcement, and whether or not the material is compressed during curing. Accordingly, the term 'non-elastic' is not an inherent characteristic of the

Appeal No. 570-33

Since we are of the view that the examiner is correct in this regard, we will sustain his rejection of claims 4 through 6 and 11 under 35 USC 112, first paragraph.

Regarding the rejection of claims 11 and 4 through 6 as being unpatentable (35 USC 103) over Whiteford, the examiner found that Whiteford teaches:

"that sheets of polypropylene (column 4, line 61), 8 mils thick (column 5, line 8), may have a rim (column 2, line 68) and can be used as covers for the bottom of receptacles,"

and concluded that:

"[a]lthough 8 mil thickness is disclosed, a 9 mil thickness would be an obvious variation,"

and that:

"[t]o cut the sheet into any shaped configuration to cover an entire receptacle or to cut a flat sheet and cover only the bottom of a receptacle is clearly an obvious matter of design choice. No patentable weight has been given to the intended use recited in the claims."

The rejection of claims 4 through 6 under 35 USC 103 as being unpatentable over Whiteford in view of Hearn is bottomed on somewhat the same reasoning. Here the examiner was of the view that to alternatively employ a decorative rim on the cover would be obvious in view of Hearn.

We have carefully considered the entire record in this case in the light of all of appellant's arguments and the examiner's responses thereto and find that the contentions of appellant do not persuade us of reversible error in the examiner's position. As we see it, the differences between the claimed subject matter and the prior art applied by the examiner are such that the subject matter of the claims, taken as a whole, would

Appeal No. 570-33

of prior art found in the Whiteford patent, wherein the material used to form the flexible layer is the same as that called for by the claims here on appeal, i.e., polypropylene, is sufficient to provide a solid evidentiary base for the examiner's legal conclusion of obviousness, we will sustain both of his rejections under the provisions of 35 USC 103 for the reasons advanced by him.

AFFIRMED

Lutrelle F. Parker
Examiner-in-Chief

Robert F. Stahl
Examiner-in-Chief

Michael J. Keenan
Examiner-in-Chief

BOARD
OF
PATENT APPEALS
AND
INTERFERENCES

ASTICS 1980

PRINCIPAL PROPERTIES

| | Poly-propylene | Poly-propylene | Poly-propylene | Poly-propylene | Poly-propylene | Poly-propylene | Poly-propylene |
|----------------|---|--|---|-------------------------------|--|-------------------------------|------------------------|
| | Hercules | Hercules | Hercules | Hercules | Hercules | Hercules | Hercules |
| | Pro-Fax 7523 | Pro-Fax 7523N | Pro-Fax 7623 | Pro-Fax 7724 | Pro-Fax 7823 | Pro-Fax 7824 | Pro-Fax 8523 |
| | | Copolymer | Copolymer | Copolymer | Copolymer | Copolymer | |
| | Copolymer, general purpose low temperature impact resist. | High Impact strength high temperatures, chemical resistant | Medium Impact strength, FDA approved for food | Heat and extraction resistant | Maximum melt strength, low temperature impact str. | Heat and extraction resistant | High Impact resistance |
| Test | | | | Profiles, pipes | | Profiles, pipes | |
| ASTM | Injection/Extrusion | Injection | Injection | Extrusion | Extrusion | Extrusion | Injection/Extrusion |
| DIN | | | | | | | |
| | <550 <288 | | | | | | <350 <177 |
| | <550 <288 | | | | | | <550 <288 |
| | <550 <288 | | | | | | <550 <288 |
| D1895 D[53466] | 2.1-2.4 | | | | 430 221 | | 2.1-2.4 |
| D955 D[53484] | 0.010-0.012 | | | | | | 0.010-0.013 |
| D1238 D[53735] | 3.6-5.0 | 4.0* | 2.0* | 0.8 | 0.4* | 0.4 | 2.8-4.0 |
| D792 D[53479] | 56.13 0.898 0.898 | 56.88 0.910 0.910 | 56.25 0.900 0.900 | 56.19 0.899 0.899 | 56.25 0.900 0.900 | 56.19 0.899 0.899 | 56.25 0.900 0.900 |
| D792 D[53479] | 30.90 1.11 1.11 | | | | | | 30.85 1.11 1.11 |
| D638 D[53455] | >4.00 >2.81 >27.6 | 4.80 3.37 33.1 | 4.10 2.88 28.3 | 4.20 2.95 29.0 | 3.50 2.74 26.9 | 4.10 2.88 26.3 | >2.90 >2.04 >20.0 |
| D638 D[53455] | 7.00 ^b 4.92 48.3 | | | | | | |
| D638 D[53455] | 1.50 ^a 1.05 10.3 | | | | | | |
| D638 D[53455] | 9.5-11 | | | | | | 6.00 4.22 41.4 |
| D638 D[53455] | | 8.8 | 9.5 | 10.5 | | 11 | 1.20 0.84 8.3 |
| D638 D[53457] | 1.70 1.20 1.17 | | | | | | 5.5-7.5 |
| D790 D[53452] | 7.00 4.92 48.3 | | | | | | |
| D790 D[53457] | 2.23 1.57 1.54 | 2.40 1.69 1.68 | 2.10 1.48 1.45 | 2.50 1.76 1.72 | 2.00 1.41 1.38 | 2.00 1.41 1.38 | 1.20 0.84 0.83 |
| D747 | >1.30 >0.91 >0.90 | 1.70 1.20 1.17 | | | | | 5.00 3.52 34.5 |
| D695 D[53454] | | | | | | | 1.64 1.15 1.13 |
| D258 | 2.10 11.42 0.11 | 1.00 5.44 0.05 | 3.50 19.04 0.19 | 5.80 31.55 0.31 | 8.00 43.52 0.43 | 8.00 43.52 0.43 | 1.02 0.72 0.70 |
| D258 | | 0.30 ^b 1.63 0.02 | 0.70 ^b 3.81 0.04 | 0.80 4.35 0.04 | 1.00 ^b 5.44 0.05 | 1.00 5.44 0.05 | >1.50 >0.16 >0.06 |
| | R88 (Rockwell) | | R88 (Rockwell) | R86 (Rockwell) | R80 (Rockwell) | R83 (Rockwell) | R61-69 (Rockwell) |
| C177 D[52612] | 1.22 4.20 0.18 | | | | | | |
| C351 | 0.50 0.50 2.09 | | | | | | 1.22 4.20 0.18 |
| D698 D[52328] | 5.44 9.80 | | | | | | 0.50 0.50 2.09 |
| D1525 D[53460] | 290 143 | | | | | | 5.44 9.80 9.80 |
| D748 | | | | | | | 275 135 |
| | >190 >88 | | | | | | |
| D648 D[53481] | >120 >49 | | 126 52 | 126 52 | 126 52 | 126 52 | >190 >88 |
| D648 D[53481] | >187 >86 | 234 112 | 190 88 | 190 88 | 187 86 | 187 86 | >111 >44 |
| | 105/1.50 | | | | | | >160 >71 |
| D257 D[53482] | >1.0X10 ⁻⁶ | | | | | | |
| D257 D[53482] | | | | | | | |
| D257 D[53482] | | | | | | | >1.0X10 ⁻⁶ |
| D149 D[53481] | 525 20.7 20.7 | | | | | | |
| D150 D[53483] | 2.3 | | | | | | 650 25.6 25.6 |
| D150 D[53483] | 2.3 | | | | | | 2.3 |
| D150 D[53483] | 2.3 | | | | | | 2.3 |
| D150 D[53483] | 0.0003 | | | | | | 2.25 |
| D150 D[53483] | 0.0003 | | | | | | 0.0003 |
| D150 D[53483] | 0.0003 | | | | | | 0.0003 |
| D542 D[53491] | | | | | | | 0.0003 |
| | Transluc/opaque | | | | | | |
| D570 D[53473] | 0.01-0.03 | | | | | | Opaque |
| D570 D[53473] | | | | | | | |
| D543 | | | | | | | 0.01-0.03 |
| D543 | None | | | | | | |
| D543 | Attacked slowly | | | | | | |
| D543 | None | | | | | | None |
| D543 | Very resistant | | | | | | Attacked slowly |